UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

K-VA-T FOOD STORES, INC.
D/B/A FOOD CITY

and

RETAIL, WHOLESALE & DEPARTMENT STORE UNION, UFCW, CLC

Cases 9-CA-46125
9-CA-46126
9-CA-46127
9-CA-46152
9-CA-46153

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

I. INTRODUCTION:

On July 11, 2011, Administrative Law Judge Paul Bogas issued his Decision and recommended Order in the above-captioned matter finding that Respondent: (1) violated Section 8(a)(1) of the National Labor Relations Act ("the Act") by promulgating and posting, in response to employees' union activities, a new policy requiring employees to clock-out before entering the breakroom and violated Section 8(a)(3) of the Act by disciplining employees Richard Branham and Darryl Sweeney pursuant to such unlawfully promulgated rule; (2) violated Section 8(a)(3) of the Act by disciplining Glenda Burton on October 23 and November 4, 2010, [1]/ and then discharging her on November 19, by disciplining Martha Smith on October 6 and then discharging her on November 22, and by discharging Ruth Ann Kirk on October 16; and (3) violated Section 8(a)(3) of the Act by assigning additional and more onerous duties to Burton on November 3 because she engaged in union activities. (ALJD p. 34, ll. 30-49 and p. 35,

[1]/ All dates are in 2010 unless otherwise stated.

ll. 1-7) The Judge dismissed the allegation that Respondent violated Section 8(a)(3) of the Act by disciplining Burton on November 12. [2]/ On July 13, 2011, pursuant to Section 102.45 of the Board's Rules and Regulations ("Rules and Regulations"), this case was transferred to the Board and, on August 24, Respondent filed timely exceptions to the Judge's Decision along with a brief in support of its exceptions ("Respondent's Brief"). [3]/

Counsel for the Acting General Counsel herein submits its answering brief to Respondent's exceptions. Respondent has advanced 84 exceptions citing, in some cases, the Judge's misapplication of the law and, in practically all cases, his "erroneous recitation of and reliance on alleged facts that are not supported by the record, disregard for key evidence and credible testimony, and erroneous determinations of credibility." Each of the exceptions have no basis in law for fact. Contrary to Respondent's claims, the Administrative Law Judge's findings that Respondent violated the Act as set forth in his Conclusions of Law are overwhelmingly supported by both the record evidence and Board law. This brief will respond to the issues raised in Respondent's brief, with reference to the exceptions by number where possible. [4]/

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[2]/ Counsel for the Acting General Counsel is filing cross-exceptions to this dismissal under separate cover.

[3]/ Under separate cover, Counsel for the Acting General Counsel has moved to strike portions of Respondent's Brief to the extent that it contains matters beyond the scope of Respondent's exceptions, contrary to Section 102.46(c) of the Rules and Regulations. More specifically, Respondent did not except to the Judge's recommendation that Burton, Smith and Kirk be reinstated and made whole or to his related finding that the purported settlement agreements that they signed did not preclude such relief. (ALJD p. 35, ll. 23-51) Notwithstanding its failure to raise such exceptions, Respondent argues in its Brief that the discriminatees are not entitled to the recommended relief and urges the Board to reject the Judge's finding and recommendations to this effect. Any exception to a ruling, finding, conclusion or recommendation that is not specifically urged shall be deemed to have been waived. Board's Rules and Regulations, Section 102.46(b)(2).

[4]/ Respondent failed to specify in its Brief the specific exceptions to which its various arguments relate. See, Board's Rules and Regulations Section 102.46(c)(3).

II. ANSWER TO RESPONDENT'S EXCEPTIONS:

A. Contrary to Respondent's Exceptions 1, 2, 3, 4, 21, 22, 23, 24, 25, 26, 27, 66, 67, 74 and 75, the Record Evidence and Legal Precedent Fully Support the Administrative Law Judge's Conclusions That Respondent Had Knowledge of Burton's, Smith's and Kirk's Union Sentiments and/or Activities.

In urging the Board to reverse the Judge's findings that Respondent knew of Burton's, Smith's and Kirk's union sentiments and/or activities, Respondent asserts that the Judge ignored both the denials of knowledge made by the decision makers who took adverse actions against them and the purported record evidence that the union's campaign was conducted "in secret." The Judge did not ignore such evidence. Regarding the claimed lack of knowledge of the decision makers, specifically Baldridge, Jamie Vaughn and Kevin Garrett, it is obvious that the Judge found that they generally lacked credibility (ALJD p. 3, ll. 35-44; p. 5, ll. 42-50; p. 8, ll. 9-11; p. 11, ll. 30-31, 42-51; p. 13, ll. 39-49; p. 14, ll. 26-31; p. 16, ll. 3-5; p. 21, ll. 46-49) and was, therefore, not inclined to credit their denials. It is beyond question that the Board accords great deference to such credibility determinations. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Even assuming that the campaign was conducted "in secret," which is very obviously contradicted by the record, such purported secrecy would not presumptively establish Respondent's lack of knowledge. See *U.S.A. Polymer Corp.*, 328 NLRB 1242, 1248, 1255 (1999).

1. Evidence Supporting Knowledge of Burton's Activities:

Noting first that Burton "was one of the most, if not *the* most, active supporters of the Union" with activity dating back to 2009 (emphasis in original) (ALJD p. 22, ll. 19-21), the Judge went on to conclude that Respondent knew about Burton's union activities and sentiments based on the following findings, which are fully supported in the record: (1) that Respondent was

aware that a union campaign was underway at its store (which Respondent does not contest) (ALJD p. 22, ll. 23-33); (2) store manager Adam Baldridge's admission that, in July 2009, employees in the store reported to him that Burton had been talking about unionization to co-workers (ALJD p. 22, ll. 35-44; Tr. 490); (3) that Respondent had kept an e-mail in Burton's personnel file that memorialized the pro-union statements of her non-employee spouse (ALJD p. 22, ll. 45-47; GC Exh. 13); and (4) that she was sufficiently associated with union organizing such that when a co-worker, Tommy Bush, wanted to find out if union activity was underway he went to Burton for the answer. (ALJD p. 22, ll. 47-50; Tr. 453) The Judge noted that Baldridge's admission that employees had told him in July 2009 that Burton was discussing unionization, on its own, was sufficient to establish Respondent's knowledge of Burton's activities. However, he found that the record as a whole supported an inference that Respondent identified Burton as an active union supporter once the 2010 organizing campaign got underway. (ALJD p. 22, ll. 43-46) Such record evidence would include the incident where Burton accompanied Smith when she challenged John Cecil regarding whether employees could earn wages comparable to the higher wages of a unionized competitor (ALJD p. 6, ll. 46-52; Tr. 193-194, 367-369), which the Judge found established Respondent's knowledge of Smith's union sentiments. (ALJD p. 31, ll. 15-18) The record supports a reasonable inference that Cecil would have considered Burton "guilty" by association. Cecil recalled with clarity having spoken to Burton and Smith and admitted that, even before the meeting, he knew both of them by name from among over 5,500 employees within his division. (Tr. 848-851, 877)

In exceptions 2, 3, 4, 23, and 24, Respondent excepts to the Judge's account of Store Manager Baldridge's July 2009 meeting with Burton as being unsupported by the record and further excepts to his reliance on such meeting to establish Respondent's knowledge of Burton's

union activities as being too remote in time to be probative of such finding. The Judge's findings regarding the July 9 meeting, particularly his finding that Baldridge asked Burton whether she had been talking to employees about unionization, to which she admitted, (ALJD p. 2, ll. 41-42 and p. 3, ll. 1-9), is supported in the record by Burton's testimony, which the Judge credited over that of Baldridge and Manager Cheryl Gowen, as well as by the corroborating testimony of Smith and Kirk. (Tr. 102-103, 106, 185, 357-362) Respondent essentially urges the Board to reverse the Judge's credibility findings, however the Board will not take such action unless warranted by a clear preponderance of all the evidence. *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951) Respondent incorrectly objects to Smith's and Kirk's corroborating testimony as inadmissible hearsay. The record demonstrates that Burton's declaration to them that her meeting with Baldridge was about the Union (Tr. 102-103, 106, 185 and 362) clearly fell within the hearsay exception as a present sense impression and/or excited utterance, *FRE* 803(1) & (2). Smith's and Kirk's account of what they *heard* Burton say does not fall within the definition of hearsay. The Judge therefore appropriately relied on their testimony as corroboration. In any event, the Judge's findings regarding what transpired at the meeting, are further supported by Baldridge's own admission that he called Burton into his office after employees told him that she had been discussing unionization. (Tr. 490, 499) The Judge properly inferred from this admission that Baldridge brought the subject of unionization up at the meeting. (ALJD p. 3, ll. 42-44) Moreover, he correctly concluded that, if Baldridge recalled Burton's 2009 union activities while on the witness stand in March 2011, he was certainly cognizant of them in October and November of 2010. (ALJD p. 22, ll. 39-43) This factually rebuts Respondent's argument that the knowledge gleaned from its 2009 meeting

was "ancient" and not probative of its knowledge at the time that it acted adversely toward Burton.

Respondent fails to advance any authority to support its argument that it was error for the Judge to rely on Respondent's retention of a 2004 pro-union e-mail from Burton's husband to establish knowledge of Burton's union proclivities. (Respondent's exceptions 1 and 26) Although remote in time from the 2010 organizing campaign, and obviously not accorded the same weight as more compelling record evidence, the unexplained retention of the document nevertheless constituted a brick in the overall wall of evidence establishing Respondent's knowledge. Moreover, it was not indispensible to the Judge's ultimate conclusion.

2. Evidence Supporting Knowledge of Smith's Activities:

In exceptions 66 and 67, Respondent excepts to the Judge's conclusion that Respondent knew about Smith's protected activities based on her outspokenness to Cecil concerning the higher wages earned by employees at a unionized competitor and her suspicions that Respondent had increased visits to the store by district managers in response to the union campaign. The Judge's account of this incident is supported by the testimony of Smith, Burton and Cecil. (Tr. 193-195, 367-369, 848-851, 877) Respondent characterizes as flawed logic the Judge's reasonable conclusion that Smith's comments were tantamount to a declaration of support for the campaign, arguing that Cecil wanted employees to ask questions and was not upset at Smith for doing so. This is akin to arguing that Cecil's failure to "get upset" at Smith means that he didn't form any belief as to her union sentiments – which itself defies both logic and established legal precedent. Moreover, the Judge did not have to "guess" at Cecil's understanding. Cecil appeared as a witness, giving the Judge full opportunity to consider his overall testimony and demeanor in determining what he understood from Smith's comments. Additional record

evidence tending to show that Respondent knew of Smith's union support includes the notation on her October 6 discipline that she wouldn't have been disciplined "if it wasn't for this union shit." [5]/ (Tr. 201; GC Exh. 7)

3. Evidence Supporting Knowledge of Kirk's Activities:

In excepting to the Judge's finding that Respondent had knowledge of Kirk's activities (exception 75), Respondent attacks the Judge's statistical analysis as "an incompetent visceral response to raw data." (Resp. Brief p. 26) Such low criticism does not overcome the well established precedent applied by the Judge that knowledge, as well as animus, may be inferred from circumstantial evidence. See, Judge's citations at ALJD p. 24, ll. 17-24; p. 33, ll. 14-17 and ll. 24-31. By attaching a numerical calculation to his findings, the Judge simply emphasized what he recognized to be the infinitesimal probability that all of the employees terminated by Respondent over a 4-month period, and during a union campaign, were coincidentally union supporters. (ALJD p. 24, ll. 7-17) The record is replete with support for the Judge's correctly drawn inference that Respondent knew of Kirk's activities, and terminated her in response to such activities, without resort to any statistical calculations. Such evidence includes the abruptness and timing of her discharge during the organizing campaign after having worked in her one-day-a-month capacity for 10 months. (Tr. 64-65, 72-74, 120, 122-123, 153, 626, 628) See, e.g., *Trader Horn of New Jersey, Inc.,* 316 NLRB 194 (1995); her conversations with both employees, including Tommy Bush, and supervisors, including Baldridge, about the Union (Tr. 91, 93, 99, 101, 107); the relative small size of Respondent's facility, coupled with Assistant Manager Garrett's admission that there were circulating rumors concerning who was involved with the Union (Tr. 744-745, 759), see, e.g., *Weise Plow Welding Co.*, 123 NLRB 616

[5]/ The transcript incorrectly states that Smith said "unionship."

(1959) and *American League*, 189 NLRB 541, 548-549 ("small plant doctrine"); [6]/ and Baldridge's admitted feeling of being surprised and "blown away" when Kirk allegedly told him that she could have helped him get rid of the Union had he not fired her. (Tr. 112, 631-632) Such surprise was obviously triggered by his belief that she supported the Union.

4. Inference of Knowledge Based on Evidence Related to Tommy Bush:

The Judge also correctly took into account the reasonable inferences that might be drawn from the fact that Tommy Bush, Assistant Manager Garrett's admitted "buddy" (Tr. 742), was one of two employees who, by Baldridge's own admission, reported Burton's 2009 activities to management and, closer to the 2010 campaign, made efforts to obtain information about union activity from other employees, including Burton and Melissa Holley, who he pressed regarding union meetings. (ALJD p. 5, ll. 1-10; Tr. 191, 328-329, 453) All three ladies testified to having spoken to Bush about the Union at one time or another. (Tr. 91, 191, 453) Contrary to Garrett's denial that Bush ever told him about anyone's protected activity, Bush's disclosure to Baldridge of Burton's activities demonstrates his inclination to report employees' activities to management and supports the reasonable inference that he would have reported Smith's and Kirk's activities as well. The Judge did not impute knowledge to Respondent based on Bush's knowledge, as Respondent appears to argue. Rather, he drew inferences from evidence tending to support the likelihood that Bush reported employees' union activities to management. Finding Bush to be an agent or supervisor of Respondent is not a prerequisite to such finding as Respondent argues.

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[6]/ Respondent employs approximately 80 nonsupervisory employees at its facility. (Tr. 571)

B. Contrary to Respondent's Exceptions the Record Evidence and Legal Precedent Fully Support the Administrative Law Judge's Conclusion that Respondent Was Hostile to Unionization and Was Motivated By Such Hostility in Taking Adverse Action Against Burton, Smith and Kirk.

The Judge's conclusion that Respondent was hostile towards unionization is well-documented in the record and is, in large part, supported by either undisputed factual evidence or findings that were based upon the Judge's credibility resolutions. [7]/ Respondent failed to raise any issues of law or fact that would warrant reversal of the Judge's conclusions regarding animus.

1. Respondent's Unsubstantiated Business Justifications:

Respondent's claim that its October 23 discipline of Burton for briefly stopping in the breakroom and subsequent promulgation of a rule restricting such conduct does not establish animus is belied by the Judge's finding, supported by overwhelming record evidence, that Respondent had long tolerated the same conduct "on a daily basis by numerous employees" before the union campaign. (Tr. 87-90, 135, 159-165, 197-198, 200, 318-323) Its claim that "high shrink" at the Louisa store, as opposed to the union campaign, precipitated the increased supervision is contradicted by the timing of the increased supervision, in September as opposed to June when the "shrink" was first identified (Tr. 78, 814) and the fact that the committee that it allegedly created to address "shrink" never met or took action to control "shrink" during the same period. (Tr. 241, 261-262, 677-678, 740) Other record evidence tending to reveal Respondent's reliance on "shrink" as an unsubstantiated and inflated business justification include Vaughn's admission that Baldridge's act of bringing Tupperware into the store did not

[7]/ For record evidence supporting the Judge's finding of animus see, Tr. 102-103, 106, 185, 357-362, 490 (Baldridge's 2009 interrogation of Burton); Tr. 193-195, 400-401, 621, 815-816 (increased presence of district level managers); GC Exhs. 12 and 17 and Tr. 307, 473 (anti-union literature); GC Exhs. 4 and 10(a); Tr. 60-61, 85-90, 135, 159-162, 164-165, 197-198, 200, 318-323, 371-377, 730-733, 745-746 (discriminatory promulgation of rule concerning stopping in breakroom); GC Exh. 13 (e-mail from Burton's husband); GC Exh. 8, p. 11 (anti-union language of employee handbook).

affect shrink (Tr. 838-830) and Assistant Manager Garrett's admission that he only "somewhat" used Respondent's guidelines for controlling shrink. (Tr. 740; Resp. Exh. 3)

2. Judges' Proper Reliance on Anti-Union Literature and Handbook Language:

None of the cases cited by Respondent contradict the well-established rule that while speech protected by Section 8(c), such as an employer's expression of its views or opinions against a union, cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer. *In Re Sunrise Healthcare Corp.*, 334 NLRB 903 (2001), citing *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Lampi, LLC.*, 327 NLRB 222 (1998), enf. denied 240 F.3d 931 (11th Cir. 2001); and *Gencorp*, 294 NLRB 717 fn. 1, 731 (1989). Thus the Judge did not run afoul of Board law by considering Respondent's antiunion literature and handbook language as further proof of Respondent's hostility toward unionization, particularly in light of the overall evidence demonstrating such hostility.

3. Irrelevance of Purported "Stalled" Union Campaign:

Finally, the Judge properly accorded little weight to Respondent's claim that it could not have been motivated by union animus because the union activity at its facility had allegedly "stalled." (ALJD p. 23, fn. 29) The only evidence Respondent proffered to show that the campaign had stalled were the logs of one of the Union organizers (Resp. Exh. 31), which shed no light on whether the Union had abandoned the campaign. More importantly, the Judge correctly found that Respondent adduced no evidence showing that it even knew the campaign had stalled or was over at the time that it discharged Burton and Smith. The case upon which Respondent relies, *Neptco, Inc.*, 346 NLRB 18 (2005), is inapposite in that the remoteness in time between the end of the organizing campaign and the discharge of two employees in that

case was one of many factors upon which the Board relied in finding that the facts did not establish animus.

C. Contrary to Respondent's Exceptions, the Administrative Law Judge Correctly Found that Respondent Would Not Have Taken Adverse Actions Against Burton, Smith and Kirk in the Absence of Their Protected Activities.

The Judge found that Respondent's purported reasons for taking adverse actions against Burton, Smith and Kirk were pretextual, which, by definition, precluded a finding that Respondent met its burden of showing that it would have taken such actions in the absence of their activities. *Metropolitan Transportation Services, Inc.*, 351 NLRB No. 43 at slip op. 3 (2007). A finding of pretext reasonably means that the reasons advanced either didn't exist or were not relied upon "thereby leaving intact the inference of wrongful motive." *Limestone Apparel Corp.*, 255 NLRB 722 (1981) enfd. 705 F.2d 799 (6th Cir. 1982). The Judge's findings of pretext are fully supported in the record.

1. Pretextual Nature of Reasons for Burton's Discipline and More Onerous Work:

The Judge's finding that Respondent failed to meet its burden with respect to Burton's October 23 discipline is supported by record evidence showing that Respondent had previously tolerated such conduct without issuing any discipline (Tr. 87, 159-160, 198-200, 318-320, 373-374) and his discrediting of Garrett's and Baldridge's testimony denying that they had ever witnessed such conduct. (ALJD p. 11) Similarly, the Judge noted, among other things, the inconsistent and incredible testimony of Vaughn and Garrett in finding that Respondent failed to meet its burden with respect to assigning her the additional duty of doing pies and cakes. (ALJD pp. 13 and 14) The lack of any record citation to support Respondent's claim in its brief that "it is common company-wide for the receiver to be assigned this task" is glaring but not surprising because there exists no record evidence supporting such assertion. To the contrary, and as the

Judge found, Respondent only identified one other store where the receiver does pies and cakes. (Tr. 716-717, 786-787, 830-831) The Judge's finding that Respondent was willing to tolerate longstanding tardiness problems before taking action, contrary to its November 4 discipline of Burton on her first documented incident of tardiness, is supported in the record by its strikingly more favorable treatment of Richard Branham. Contrary to Respondent's argument, Respondent's discipline of Richard Branham for tardiness on November 7, after letting such conduct go uncorrected for almost 2 years, is not evidence of comparable action, but rather clear proof of blatant disparate treatment. [8]/ (Tr. 655-656, 754; GC Exh. 9(a))

2. Pretextual Nature of Reasons for Smith's Discipline:

The Judge correctly found that Respondent would not have disciplined Smith on October 6 for missing a mandatory meeting concerning the union based upon evidence showing that 11 other employees also missed the meeting without repercussion, 12 missed a similar meeting held on September 29 without repercussion, and 26 missed meetings held on October 21 without repercussion. (Tr. 298-299, 605; GC Exh. 15) Respondent argues, without any citation to the record, that the "critical difference" between those employees and Smith is that they discussed their absences with a manager prior to missing the meetings. The Judge's finding to the contrary is supported by the testimony of Melissa Holley, who missed the October 5 meeting without being excused or disciplined (Tr. 324-325) and his discrediting of Baldridge's "self-serving" testimony. (ALJD p. 31, ll. 34-36)

3. Pretextual Nature of Reasons for Terminating Kirk:

The Judge's finding that Respondent would not have terminated Kirk in the absence of her union activities is supported by record evidence showing that it had given Kirk no indication

[8]/ Also see Jason Vance who had unsatisfactory attendance and tardiness for over a month before being disciplined. (GG Exh. 9(a))

prior to the campaign that it was going to be training someone to replace her (Tr. 110), the fact that the alleged replacement for her backup deputy job, Lee Maggard, was already assisting Smith while Kirk was still employed (Tr. 229-230) and, the fact that, by Baldridge's own account, and contrary to Respondent's claims that the assignment was understood to be temporary, Kirk had held the job for almost a year. (Tr. 73-74, 628) Moreover, the record evidence demonstrates that Respondent had no prior history of employing a regular backup deputy who worked more than intermittently. (Tr. 74, 153, 624-625) Most significantly, and as found by the Judge, Respondent previously allowed another employee to perform assistant secretary duties on a once-a-month schedule for 2 years. (ALJD p. 8, ll. 27-29)

4. Failure to Adduce Any Policies Supporting Burton's and Smith's Discharge:

Respondent argues that it terminated Burton and Smith pursuant to "clear policy violations" and that the Judge improperly substituted his own judgment for Respondent's business judgment. The Judge correctly found that Respondent's failure to corroborate such purported "business judgment" with any actual policies or practices demonstrate that it would not have terminated Burton and Smith in the absence of their protected activities. Counsel for the Acting General Counsel has already pointed out evidence in the record showing Respondent's overblown and unsubstantiated reliance on "shrink" as warranting its adverse actions. (Tr. 241, 261-262, 677-678, 740, 838-839; Resp. Exh. 3) Additionally, Respondent failed to prove that Burton's single failure to properly handle the outdated pies and cakes, albeit having an impact on shrink, would have warranted discharge in the absence of her union activities. Indeed, Baldridge and Vaughn admitted that they would have talked to her first before terminating her based upon the outdated pies and cakes. (Tr. 667, 832-833)

Respondent never produced any written rules defining Tupperware as unauthorized or prohibiting Burton from bringing such an item in through the receiving door and, in fact, admitted that Burton could have brought it in through the front door. (Tr. 845) The only clear rule in the record regarding employee use of the receiving door was the rule prohibiting employees from using it to enter the store for work or to exit it after getting off of work. (Tr. 80-81) Moreover, the undisputed record evidence established that employees regularly used the receiving door to take out garbage as long as Burton, or some other authorized person, was present to monitor them. (Tr. 75-76, 158, 330, 347) Respondent admitted that it was Burton's job to monitor the receiving door and she had the authority to permit employees to use it. (Tr. 611, 677)

Respondent's termination of Smith for "going out the receiving door without authorization," "[taking] pop crates outside" and being "an accomplice to bringing an unauthorized item through the back [door]" (GC Exh. 6) was blatantly pretextual. The undisputed record evidence established that, for years and at the time she was terminated, Smith had a code to the receiving door (Tr. 178, 348, 611); that she regularly assisted Burton with taking garbage out the receiving door (Tr. 174, 178) and that she also went out the receiving door to perform other tasks, such as cleaning the dumpster area. (Tr. 174-175)

Finally, Respondent failed to demonstrate that any of the conduct shown in its surveillance taping of Burton and Smith (Resp. Exh. 12), upon which it so heavily relied, constituted misconduct – or even that it could have reasonably believed that they engaged in misconduct based on what was depicted in the tape. Respondent failed to even interview the vendor shown in the tape – or to interview anyone involved for that matter (Tr. Tr. 215-216, 249-250, 257-258, 402-403, 407, 562, 669, 671-674, 800-806, 833-835, 842-844) - before allegedly

concluding that Burton and Smith committed dischargeable offenses. See, e.g., *Estes Nursing Facility – Oak Knoll*, 301 NLRB 659, 676 (1991). On the other hand, Burton's, Smith's and Kirk's testimony demonstrates that Burton and Smith did not violate Respondent's policies (save for lingering and talking to Kirk for 7 or 8 minutes), and more particularly, neither kept the vendor waiting nor breached the security of the receiving door. (Tr. 82-83, 114-117, 213-214, 218, 247, 249-250, 257-258, 267, 349, 404-407)

III. WAIVER AND RELEASES SIGNED BY BURTON, SMITH AND KIRK:

As already indicated herein, Respondent failed to except to the Judge's recommendation and findings that Burton, Smith and Kirk be reinstated and made whole or to his related finding that the purported settlement agreements by them did not preclude such relief. Thus, it would be inappropriate and contrary to the Board's Rules and Regulations for the Board to review the Judge's findings and recommendation regarding the remedy or the "settlement" agreement. However, should the Board decide to review the Judge's findings in this respect, for the reasons set forth below, the Board should find that the Judge's findings are fully supported by the record and consistent with Board law.

The Judge's basis for recommending make-whole relief clearly comports with *Independent Stave Co.*, 287 NLRB 740 (1987) and is fully supported by the record. Under *Independent Stave*, the Board examines all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound, and the position taken by the Acting General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether

the respondent has a history of violations of the Act or has breached past unfair labor practice settlement agreements. *Independent Stave*, 287 NLRB at 743.

The Judge properly refused to defer to the agreements. The agreements were not appropriate for deferral based on the first, second, and third factors. The Judge properly relied on the fact that neither Counsel for the Acting General Counsel nor the Charging Party Union have agreed to be bound by the agreements and both are opposed to giving them effect. The Board has declined to defer to waivers where the charging party unions were not a party to or in agreement with such waivers. See *Clark Distribution Systems*, 336 NLRB 747, 750-751 (2001); *Webco Industries*, 334 NLRB 608, 611 (2001), enfd. 90 Fed. Appx. 276 (10th Cir. 2003); *Weldun International*, 321 NLRB 733, 734 fn. 6 (1996), enfd. mem. in relevant part, 165 F.3d 28 (6th Cir. 1998). Further, the Acting General Counsel's opposition to waivers in severance agreements carries great weight and militates against deferral. See, e.g., *Clark Distribution*, 336 NLRB at 750, citing *Frontier Foundries*, 312 NLRB 73, 74 (1993) (giving considerable weight to the Acting General Counsel's opposition to settlement where settlement executed during administrative hearing). While the Board noted in *BP Amoco Chemical–Chocolate Bayou*, 351 NLRB 614 (2007), that union and Acting General Counsel opposition "should not be elevated to primary status," it also noted that such opposition continues to be a consideration under the first *Independent Stave* factor. *Id.* at 615 fn. 9. This is wholly appropriate because, in vindicating the public interest, the Acting General Counsel seeks remedies that are broader than simply obtaining back pay for the discriminatees. Rather, the Acting General Counsel also seeks to obtain cease and desist orders and notice postings that will protect the Section 7 rights of the unit employees to continue their organizing campaign.

As to the second factor, the structure of the settlement is unreasonable. The conditional extra payments are not intended as backpay, but instead to be used to avoid a Board remedy and effectively undermine the Charging Party. Indeed, such payments encourage the discriminatees to pursue withdrawal of the complaint in order to obtain additional monies under the settlement, leaving unremedied certain other allegations. In any event, and as the Judge found, Burton, Smith and Kirk have not even received the benefit of what they bargained for by entering into the agreements because receipt of the entire amount under the agreements, which they have yet to receive, is conditioned upon *withdrawal* of the entire complaint, contrary to what Respondent told them and what they understood at the time of execution. In this regard, and as the Judge found, the testimony of all three ladies demonstrated that they believed that they were waiving reinstatement in exchange for the entire amount payable under the agreements, not the partial amounts that they have received to date. (Tr. 285-286; 290; 293-294; 296-297; 454; 458-459)

As to the third factor, the use of fraud, duress, or coercion to obtain the release, there is evidence that Respondent misled Burton, Smith and Kirk into believing that they would become eligible for the remaining larger amounts by simply informing the Union or the Board to remove their names from the case. (Tr. 285-286; 294; 454; 458-459) This is inconsistent with the language of the release which states that additional monies would be paid *only after* the Board has withdrawn the complaint, particularly since the complaint also contains allegations that do not involve these three employees. None of the three employees understood what it meant to have a complaint withdrawn by the Board, (Tr. 286; 290-293), which clearly distinguishes this case where the Board has found deferral to be proper. The Board has deferred to waivers in severance agreements where an employer "encouraged the alleged discriminatees to consult attorneys, provided them sufficient time to carefully review and assess the agreements, and

provided them with the opportunity to revoke the agreements within a reasonable period after execution." See also *Hughes Christensen Co.*, 317 NLRB 633, 634 (1995). Here, however, neither the agreements themselves nor the evidence surrounding the execution of the agreements indicates that Respondent made any attempt to inform the three employees that they might seek counsel or take a reasonable amount of time to review and possibly revoke the agreements.

In all these circumstances, the Judge correctly concluded that the agreement and releases do not preclude a full Board remedy, including offers of reinstatement.

IV. CONCLUSION:

The Administrative Law Judge's Decision finding that Respondent violated the Act is fully supported by the record and extant Board law. The Respondent failed to raise any exceptions of law or fact that would warrant reversal of the Judge's Decision. For these reasons, and based on the foregoing, the Board should reject all of the Respondent's exceptions and issue an Order in due course consistent with the Judge's recommendations. [9/]

Dated at Cincinnati, Ohio this 7th day of September 2011.

Respectfully submitted,

Naima R. Clarke

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[9/] With exception to his dismissal of the allegation that Respondent disciplined Burton on November 12, in violation of Section 8(a)(3).

CERTIFICATE OF SERVICE

September 7, 2011

The undersigned hereby certifies that the foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions was served by electronic mail to the following persons:

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